Marcia Loh Yunn Ping (f) v Joannes Lau Siong Chung and another suit

HIGH COURT (MIRI) — SUIT NOS 22–10 OF 2001(MR) AND 22–29 OF 2001(MR)
ABDUL RAHMAN SEBLI J
25 OCTOBER 2010

Contract — Formation — Sale and purchase of land — Oral agreement — Payment voucher alleged as agreement — Whether legally valid and binding contract of sale and purchase — True intention of parties — Whether purported agreement a fabrication — Whether specific performance ought to be granted

The plaintiff, in the first suit, was claiming for specific performance of an agreement which the plaintiff claimed was made between herself and the defendant, Joannes Lau Siong Chung ('Joannes Lau'). The plaintiff claimed that the defendant had agreed to sell her a piece of land at the price of RM200,000 but had refused to complete the agreement by failure to transfer the land to her. The defendant denied the plaintiff's claim and counterclaims for removal of the caveat entered by the plaintiff in respect of the land. The defendant's case was that the purported agreement was a fabrication. In the second suit, Joannes Lau was claiming, inter alia, for the sum of RM206,415 being the balance of the price of earth supplied to the third defendant, Trident Training (Miri) Sdn Bhd ('Trident'). The plaintiff's testimony was that she was a Director of Trident and her father ('PW2') was the managing director of the company. According to the plaintiff, she was the nominee purchaser of Joannes Lau's land. PW2 in his testimony stated that he had entered into an oral agreement with Joannes Lau for the purchase of Joannes Lau's land and not merely for the purchase of earth from his land. He said the purchase was for the benefit of his daughter, the plaintiff. In support of his claim that Joannes Lau had agreed to sell the land to him, PW2 relied on the payment voucher ('PI') which he said was evidence of down payment for the purchase price of the land. Joannes Lau vehemently disputed the contents of the PI. Joannes Lau stated that the said P1 was a forgery. He had lodged a police report which led to the prosecution of the plaintiff, PW1 and PW2 but the trio were acquitted after a full trial. Their acquittals were affirmed by the High Court. The issues for the determination of this court are as follows: (i) whether the agreement was for the sale of Joannes Lau's land or for the sale and supply of earth from Joannes Lau's land to Trident's land; and (ii) whether there was a valid contract between the plaintiff (the nominee purchaser) and Joannes Lau for the purchase of the land.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim:

(1) It was inherently improbable that a housing developer like Joannes Lau who deals in estate would sell his land worth hundreds of thousands of ringgit without prior negotiation with the intended buyer and documented only by a payment voucher. The totality of the evidence and the probabilities of the case irresistibly point to the fact that all negotiations between PW2 and Joannes Lau were for the supply of earth to Trident's land and not for the sale of Joannes Lau's land to PW2. This was the only reasonable inference that could be drawn from the surrounding circumstances. This court was satisfied that there was no agreement to sell Joannes Lau's land to anyone, the plaintiff included, the plaintiff in the first suit.

(2) In the instant case, the alleged 'agreement', ie, the payment voucher does not mention who the parties to the contract were and there was no evidence that the plaintiff and Joannes Lau intended to create legal relations over the land. As nominee purchaser, the plaintiff had no contractual relationship with Joannes Lau. Her contractual relationship if at all was with PW2. The plaintiff did not even know who purchased the land and had no intention of buying the land. Her role was merely to issue a cheque in the sum of RM20,000 for purposes which she herself did not even know of. Therefore, her pleading in para 8 of her reply that the price of RM200,000 was 'expressly agreed on a willing seller and willing buyer basis' was refuted by her own evidence. Neither was PW2 the buyer because he did not even tell the plaintiff he was buying the land. Even if he was the buyer, he was not the plaintiff in this case and was therefore not entitled to the reliefs sought by the plaintiff. There was no evidence that PW2 had met or discussed with Joannes Lau to buy his land. One would expect this to be the least that contracting parties would do if they intended to create legal relations.

(3) There was no oral agreement for the sale of the land and the payment voucher did not create any valid contract between the plaintiff and the defendant and this is so even assuming the payment voucher is not a forgery. It was clear that the issuance of the payment voucher was for the purpose as claimed by Joannes Lau, namely for partial payment of the earth he supplied to Trident's land and not for the sale of his land as claimed by PW2.

[Bahasa Malaysia summary

Plaintif, di dalam guaman pertama, menuntut pelaksanaan spesifik satu perjanjian yang mana plaintif mendakwa telah dimasuki di antara plaintif dengan defendan, Joannes Lau Siong Chung ('Joannes Lau'). Plaintif mendakwa bahawa defendan telah bersetuju untuk menjual sebidang tanah

miliknya pada harga RM200,000 tetapi telah enggan menyelesaikan perjanjian tersebut dengan kegagalan memindah milik tanah kepadanya. Defendan menafikan tuntutan plaintif dan menuntut balas untuk pemotongan kaveat yang dimasukkan oleh plaintif berkaitan dengan tanah tersebut. Kes defendan adalah bahawa perjanjian yang didakwa adalah sesuatu yang diada-adakan. Di dalam guaman kedua Joannes Lau menuntut, antara lain, wang sejumlah RM206,415 sebagai baki pasir yang dibekalkan kepada defendan ketiga, Trident Training (Miri) Sdn Bhd ('Trident'). Keterangan plaintif adalah bahawa dia adalah Pengarah Trident dan bapanya ('PW2') adalah pengarah urusan syarikat. Menurut plaintif, dia adalah pembeli yang dinamakan untuk tanah Joannes Lau. PW2 di dalam keterangannya menyatakan bahawa dia telah memasuki perjanjian lisan dengan Joannes Lau untuk membeli tanah Joannes Lau dan bukan semata-mata untuk membeli pasir daripada tanahnya. Dia menyatakan bahawa pembelian tersebut adalah untuk faedah anak perempuannya, plaintif. Sebagai sokongan bagi tuntutannya bahawa Joannes Lau telah bersetuju untuk menjual tanah kepadanya, PW2 telah menyandar atas baucar bayaran ('PI') yang dikatakannya adalah keterangan bayaran muka untuk harga belian tanah tersebut. Joannes Lau mempertikaikan sekeras-kerasnya kandungan PI. Joannes Lau menyatakan bahawa PI adalah pemalsuan. Dia telah membuat laporan polis yang membawa kepada pendakwaan plaintif, PW1 dan PW2 tetapi ketiga-tiga mereka dilepaskan selepas perbicaraan penuh. Pelepasan mereka disahkan oleh Mahkamah Tinggi. Isu-isu untuk diputuskan oleh mahkamah ini adalah seperti berikut: (i) sama ada perjanjian adalah untuk jualan tanah Joannes Lau atau untuk jualan dan pembekalan pasir dari tanah Joannes Lau kepada tanah Trident; dan (ii) sama ada terdapat kontrak yang sah di antara plaintif (pembeli yang dinamakan) dan Joannes Lau untuk pembelian tanah tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos dan membenarkan tuntutan balas defendan dengan kos:

(1) Adalah amat tidak munasabah bahawa pemaju perumahan seperti Joannes Lau yang berurusan dalam hartanah akan menjual tanahnya yang bernilai beratus ribu ringgit tanpa rundingan terdahulu dengan pembeli yang berniat dan mendokumentasikan hanya dengan baucar bayaran. Keseluruhan keterangan dan kemungkinan kes jelas merujuk kepada fakta bahawa kesemua rundingan di antara PW2 dan Joannes Lau adalah untuk pembekalan pasir kepada tanah Trident dan bukan untuk jualan tanah Joannes Lau kepada PW2. Ini adalah inferens yang munasabah yang boleh dibuat daripada keadaan kes. Mahkamah ini berpuas hati bahawa tidak ada perjanjian untuk menjual tanah Joannes Lau kepada sesiapa, termasuk plaintif, plaintif di dalam guaman pertama.

(2) Di dalam kes ini, 'agreement' yang didakwa iaitu baucar bayaran tidak menyatakan siapa pihak kepada kontrak tersebut dan tidak ada keterangan bahawa plaintif dan Joannes Lau berniat untuk membuat

hubungan dari segi undang-undang bagi tanah tersebut. Sebagai pembeli yang dinamakan, plaintif tidak ada hubungan kontrak dengan Joannes Lau. Hubungan kontraknya, jika ada, ialah dengan PW2. Plaintif tidak tahu pun siapa yang membeli tanah dan tidak ada niat untuk membeli tanah tersebut. Peranannya hanyalah semata-mata mengeluarkan cek sejumlah RM20,000 untuk tujuan yang mana dia sendiri tidak tahu. Oleh itu, plidingnya di dalam perenggan 8 jawapannya bahawa RM200,000 telah 'expressly agreed on a willing seller and willing buyer basis' dinafikan oleh keterangannya sendiri. PW2 juga bukan pembeli kerana dia tidak memberitahu pun plaintif bahawa dia membeli tanah tersebut. Jika pun dia adalah pembeli, dia bukan plaintif di dalam kes ini dan oleh itu tidak berhak untuk relief yang dipohon oleh plaintif. Tidak ada keterangan bahawa PW2 telah bertemu atau berunding dengan Joannes Lau untuk membeli tanahnya. Seseorang akan mengharapkan ini sebagai perkara yang paling mungkin dibuat oleh pihak-pihak jika mereka berniat untuk membentuk ikatan undang-undang.

(3) Tidak ada perjanjian lisan untuk jualan tanah dan baucar bayaran tidak membentuk kontrak yang sah di antara plaintif dan defendan dan ini juga adalah benar walaupun baucar bayaran tersebut dianggap bukan pemalsuan. Jelas bahawa pengeluaran baucar bayaran untuk tujuan seperti yang dinyatakan oleh Joannes Lau, iaitu untuk sebahagian bayaran pasir yang telah dibekalkan kepada tanah Trident dan bukan untuk jualan tanahnya seperti yang dinyatakan oleh PW2.]

Notes

For a case on sale and purchase of land, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 3818.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)

Ahmad bin Daud v Koperasi Jimat Cermat dan Pinjaman Mercantile Bhd [2011] 4 MLJ 516; [2010] 5 AMR 540, HC (refd)

Browne v Dunn (1893) 6 R 67 (refd)

CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin [2010] 9 MLJ 176, HC (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)

Khoon Chye Hin v PP [1961] MLJ 105; [1961] 1 LNS 41, HC (folld)

Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia [2000] 2 MLJ 535, CA (refd)

Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd [1992] 3 CLJ 611 (Rep); [1992] 1 CLJ 204, HC (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Wong Ho Leng (Wong Ho Leng & Co) in Suit No 22–10–2001(MR) for the plaintiff.

Anthony Tai (Felix Fong with him) (Anthony Tai Advocates) in Suit No 22–10–2001(MR) for the defendant.
Anthony Tai (Felix Fong with him) (Anthony Tai Advocates) in Suit No 22–29 of 2001(MR) for the plaintiff.
Wong Ho Leng (Wong Ho Leng & Co) in Suit No 22–29 of 2001(MR) for the defendants.

Abdul Rahman Sebli J:

THE FIRST SUIT

[1] In Suit No 22–10 of 2001(MR) ('the first suit') the plaintiff Marcia Loh Yunn Ping ('Marcia Loh') is claiming for specific performance of an agreement which she claimed was made on or about 22 May 2000 between herself and the defendant Joannes Lau Siong Chung ('Joannes Lau'). Her pleaded case is that Joannes Lau had agreed to sell her a piece of land at the price of RM200,000 but had refused to complete the agreement by transferring the land to her. Joannes Lau denied the claim and counterclaims for removal of the caveat entered by Marcia Loh in respect of the land. His case is that the purported agreement is a fabrication.

THE SECOND SUIT

[2] In Suit No 22–29 of 2001(MR) ('the second suit') Joannes Lau is claiming, inter alia, for the sum of RM206,415 being the balance of the price of earth supplied to the third defendant Trident Training (Miri) Sdn Bhd ('Trident').

THE ISSUES

[3] There are two common issues to be decided, namely:

(a) Whether the agreement was for the sale of Joannes Lau's land or whether the agreement was only for the sale and supply of earth from Joannes Lau's land to Trident's land.

(b) Whether there is a valid contract between Marcia Loh (the nominee purchaser) and Joannes Lau for the purchase of the land.

[4] The two issues are interrelated and the evidence overlap but for the sake of clarity I shall deal with them separately.

THE FIRST ISSUE

[5] Whether the agreement was for the sale of Joannes Lau's land or for the

sale of earth only from his land is purely a question of fact and a matter of determining which party is telling the truth. It is undisputed that Joannes Lau is the registered proprietor of Lot 1825 Lambir Land District (now Lot 4820 Block 1 Lambir Land District) and that he had a licence to remove earth from this land. This is the subject matter of the dispute. Trident on the other hand is the registered owner of all that parcel of land situate at Lopeng, Miri known as Lot 3895 Block 1 Lambir Land District.

[6] Marcia Loh's testimony is that she is a Director of Trident and her father (PW2) is the managing director of the company. According to her she was the nominee purchaser of Joannes Lau's land. PW2 was called to give evidence and the crux of his testimony is that he had entered into an oral agreement with Joannes Lau for the purchase of Joannes Lau's land and not merely for the purchase of earth from his land. He said the purchase was for the benefit of his daughter Marcia Loh. It is obvious that it is PW2 rather than Marcia Loh who is the real 'plaintiff' in the first suit.

[7] In support of his claim that Joannes Lau had agreed to sell the land to him PW2 relied on the payment voucher ('exh P1') dated 22 May 2000 which he said is evidence of down payment for the purchase price of the land. The payment voucher contains the following words:

> being downpayment for the purchase price of Lot 01825 Block 000, Lambir Land District at a selling price of RM200,000.00 only, effective transfer of ownership on or before 17th of June, 2000.

[8] According to PW2 the payment voucher was prepared by Jimmy Ho Yie Tieng ('PW1') on his instruction. He said the instruction was given over the phone. Joannes Lau vehemently disputed the contents of the payment voucher. He said P1 is a forgery as the words quoted above were not there when he signed P1 on 22 May 2000. He lodged a police report which led to the prosecution of Marcia Loh, PW1 and PW2 but the trio were acquitted by the Magistrates Court at Miri after a full trial. Their acquittals were affirmed by the High Court.

[9] Joannes Lau's version is that on 3 May 1999 PW2 approached him expressing his desire to purchase earth from his land to fill his company's land at Lopeng, Miri. He quoted a price of RM45 per truck but PW2 asked for a lower price of RM35 which he agreed to. The quotation is at exh D39. Joannes Lau then proceeded to supply earth to DW1 starting from 22 April 2000 until 16 June 2000. In support of his claim, Joannes Lau produced the invoices issued by Chiew Fatt Sdn Bhd ('Chiew Fatt'), the company that transported the earth from his land to Trident's land.

[10] This part of Joannes Lau's evidence is supported by the evidence of Loh Yut Kuah (DW1) the Managing Director of Chiew Fatt. According to DW1 his job was to load, transport and level the earth at Trident's land. As for the price of the earth he said he left it to PW2 and Joannes Lau to negotiate. Trident on its part had paid Chiew Fatt for the services as evidenced by the receipts at exhs D2, D3, D4, D5, D6 and D7.

[11] The delivery orders ('exhs D43, D44, D45 and D46') further confirm that 6469 truckloads of earth were delivered to Trident's land from Joannes Lau's land from 22 April 2000 – 16 June 2000. These delivery orders were issued by Brokenhill Resources Supply Company of which Joannes Lau is the sole proprietor. The evidence of Toh Whee Tiong ('DW4') which I accept is that the lorry drivers and PW2's representatives Ho Su Khiong and Ha Tiong Seng signed on the delivery orders to confirm loading and delivery of earth to Trident's land. His evidence is indirectly confirmed by PW2 himself who admitted in cross-examination that Ho Su Khiong and Ha Tiong Seng are his relatives cum employees and were his company's representatives at the company's land and that Ha Tiong Seng's job was to check and receive earth that was transported to Trident's land.

[12] According to Joannes Lau the total value of earth he supplied to Trident was RM226,415 but he was only paid RM20,000 by Trident. He demanded payment for the balance but PW2 kept avoiding him and could not be reached by phone. Joannes Lau was adamant that the RM20,000 paid to him by Marcia Loh vide payment voucher P1 was for part payment of the earth supplied to Trident and not for the sale of his land. He said it is ridiculous for him to sell his land containing 4.52 acres for only RM200,000 when the value of the land based on the valuation report is RM900,000 and this is not inclusive of the remaining earth which could fetch a price of about RM400,000.

[13] Having considered the conflicting evidence between Joannes Lau and PW2 on this point I find the testimony of Joannes Lau to be more probable. His testimony that on 9 March 2000 and 11 March 2000 he spoke to PW2 over the phone to negotiate the price of earth to be supplied to Trident was not challenged in cross-examination. Clearly this part of his evidence is crucial and failure to cross-examine must amount to admission of its truth: see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; *Browne v Dunn* (1893) 6 R 67. In *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 Mukharji J said:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise trial and miscarriage of justice because it gives notice to the other side of the actual case that is going to be made when the turn of the party

A on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in it's entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[14] More importantly PW2 himself admitted both in his witness statement ('PWS2') and in examination-in-chief that he did negotiate with Joannes Lau on the purchase of earth. The Q & A of PW2 at p 87 of the notes of proceeding is as follows:

Q: Did you ever negotiate with Joannes Lau for the purchase of soil with him. Refer to PWS2 QA21. According to the evidence of DW1 he said that the price of the earth would be agreed between you and Joannes, is that true?

A: Yes.

[15] Whatever the context of the answer it is a clear admission by PW2 that he did negotiate the price of earth (and not land) with Joannes Lau. He could not be talking about the alleged failed negotiation for the price of earth between himself and Joannes Lau because the question specifically referred to the testimony of DW1 that he left the price of earth for PW2 and Joannes Lau to negotiate. It is unlikely that PW2 misunderstood the question. Having seen him giving evidence I find him to be highly intelligent. In the face of this admission PW2's claim in other parts of his testimony that Joannes Lau never sold and delivered earth to him sounds hollow. His claim cannot possibly be true because there is irrefutable evidence of earth having been transported from Joannes Lau's land to Trident's land.

[16] This fact, and the fact that Joannes Lau made numerous phone calls to PW2 to demand payment as evidenced by the telephone bills and PW2's avoidance when Joannes Lau tried to contact him lend credence to Joannes Lau's testimony that when he signed the payment voucher it was meant for partial payment of the earth that he supplied to Trident's land and not for an outright sale of his land. Perhaps it is useful to reproduce the following parts of Joannes Lau's evidence, if only to show how desperate he was in demanding payment from PW2:

I telephoned Richard Loh to make payments on the 6th day for the supply of earth but he asked me to let him pay on the 2nd week and thereafter telephoned again and also at the dumping site when I met him to ask for the payment again but he asked

me to allow him to pay on the 3rd week and on the 4th week his telephone line especially his handphone could not be contacted. Thereafter I went to his office to demand payment from his operations manager Jimmy Ho at Trident Training (Miri) Sdn Bhd office. He said that his brother Richard Loh was away overseas or in Singapore and he will make the payment as soon as he came back. But in the 4th week no payment was made by Richard Loh and I threatened to stop the supply of earth to Trident. Only then Jimmy Ho said he would pay on behalf of Richard Loh of Trident Training at initial payment of RM20,000.00 and requested me to continue supplying earth and I still kept on demanding further payment from Jimmy Ho up to the completion of earth filling on 16.6.2000 as Richard Loh could not be contacted at his office, his home and his handphone.

[17] I accept Joannes Lau's evidence that he only agreed to sell earth to Trident and that when he signed the payment voucher for the sum of RM20,000 on 22 May 2000 the words quoted earlier were not there. Jimmy Ho (PW1) claimed that when he wrote on the payment voucher on 22 May 2000 he had no document with him. He said he only referred to the cheque issued by Marcia Loh. How then did he know the lot number of Joannes Lau's land to enable him to write it down on the payment voucher?

[18] There is another aspect of PW1's evidence which casts doubts on his claim that the RM20,000 paid to Joannes Lau on 22 May 2000 was part payment for the purchase price of the land. His evidence is that when Joannes Lau came to Trident's office on 22 May 2000 to receive the RM20,000 down payment that was the first time he saw Joannes Lau. Now, it is inconceivable that two total strangers would conclude a land deal within such short period of time with only a payment voucher as documentary proof of the transaction. In all probability those words, including the lot number of the land were added subsequent to the signing of the payment voucher, as alleged by Joannes Lau.

[19] There is evidence that PW2 personally made a search on the land on 2 August 2000, more than two months after the issuance of the payment voucher. What transpired at Trident's office prior to the issuance of the payment voucher to Joannes Lau is also suspicious. It appears to be shrouded in secrecy. Marcia Loh's evidence is that when PW2 instructed her to go to the office on that day to pay Joannes Lau the RM20,000 she was also told to wait for further instruction from PW2. Reproduced below is her evidence under cross-examination:

A: I was instructed by my father to be at the office.

Q: Why did he instruct you to be at the office?

A: He instructed me to write a cheque amounting to RM20,000.00 payable to Joannes Lau Shiong Chung and bring it to the office.

Q: Is that all the instruction he gave you?

A: No. He instructed me to wait for Joannes Lau together with Jimmy Ho and to call him when all the parties had arrived. Further instruction shall be given during our telephone conversation.

[20] If indeed the RM20,000 was meant as down payment for the purchase of Joannes Lau's land it beats logic and reason why there was the need for PW2 to be so secretive about the transaction to the extent of withholding information from her own daughter who is also a director of Trident and to disclose it to her only after the arrival of Joannes Lau. The way Marcia Loh, PW1 and PW2 conducted themselves prior to the issuance of the payment voucher shows that something was not right with the whole transaction. I am satisfied beyond any reasonable doubt that P1 is a forgery.

[21] The fact that Marcia Loh, PW1 and PW2 were acquitted by the court following the police report lodged by Joannes Lau cannot be used as a yardstick to measure the truth of Joannes Lau's claim that the payment voucher is a forgery. Clearly this court is not bound by the magistrates court decision. In any event there is no material before this court to show the actual reasons for their acquittal and of what offence.

[22] Judging from the statements of PW1 and PW2 in their witness statements (PWS1, PWS2) the prosecutor in that case did not adduce any evidence to prove that the payment voucher had been forged or tempered with. This is strange. Are PW1 and PW2 suggesting that they were a victim of malicious prosecution or that the prosecutor did not do his work properly?

[23] Whatever may be the reason for their acquittal it is inherently improbable that a housing developer like Joannes Lau who deals in estate would sell his land worth hundreds of thousand of ringgit without prior negotiation with the intended buyer and documented only by a payment voucher. The totality of the evidence and the probabilities of the case irresistibly point to the fact that all negotiations between PW2 and Joannes Lau were for the supply of earth to Trident's land and not for the sale of Joannes Lau's land to PW2. This is the only reasonable inference that can be drawn from the surrounding circumstances. I am satisfied that there was no agreement to sell Joannes Lau's land to anyone, Marcia Loh included, the plaintiff in the first suit.

[24] As can be seen from the record Joannes Lau was subjected to intensive cross examination (pp 242–289 of the notes of proceeding) by learned counsel for Marcia Loh but I must say that he acquitted himself well. Other than the facts which I find to be favourable to him I have no reason to doubt his credibility as a witness. From his demeanour and manner while giving evidence I find him to be an honest and straightforward witness who answered questions

in cross examination promptly and spontaneously. I am mindful of the fact that demeanour is not the touchstone of truth but in the case of Joannes Lau he struck me as a witness of truth.

THE SECOND ISSUE

[25] Marcia Loh's case in relation to the second issue is pleaded as follows:

> 3. The said agreement between the parties was made partly in writing, partly orally and partly by conduct.
>
> 3.1 In so far as it was oral, the said agreement was made through the oral conversation between the Plaintiff and one Mr. HO YIE TIENG (also known as Mr. Jimmy Ho) with the Defendant which took place in May 2000.
>
> 3.2 In so far as it was in writing, the said agreement was contained in or to be inferred from the Payment Voucher dated 22/5/2000;
>
> 3.3 In so far as it was conduct, the conduct consisted of or to be inferred from the execution of the Payment Voucher and receipt of the agreed deposit of RM20,000.00 from the Plaintiff."

[26] By the pleading it is Marcia Loh's case that the agreement to sell the land was between her and Joannes Lau. I have dealt with the payment voucher in dealing with the first issue. My finding that the payment voucher is a forgery disposes of Marcia Loh's claim that the agreement for the purchase of the land was through the payment voucher. No such agreement, if at all it can be called an agreement can be enforced in a court of law. The only factual issue left to be considered in relation to the second issue is whether there was an 'oral conversation' between Marcia Loh and Jimmy Ho with Joannes Lau in May 2000 as pleaded in para 3.1.

[27] Pleadings to be of any value must be backed by evidence. No matter how forceful the pleadings may be, without evidential backing they are worth nothing unless admitted or deemed to be admitted by the other party.

[28] Is there evidence of the alleged oral conversation between Marcia Loh and Jimmy Ho with Joannes Lau? Not a morsel as far as the evidence is concerned. Marcia Loh and Jimmy Ho (PW1) in their testimonies did not say a word about any conversation with Joannes Lau with regard to the purchase of any land, let alone the land in question. In fact the evidence shows that Marcia Loh knew nothing about the land. She issued the payment voucher for the sum of RM20,000 to Joannes Lau simply because she was asked to do so by her father (PW2). Her Q & A in cross-examination on this payment of RM20,000 is reproduced below:

> Q: Why did your father instruct you to issue the cheque for RM20,000.00 payable to Joannes Lau?

A: I did not know at that moment.

[29] Apart from showing Marcia Loh's complete ignorance on the purpose of the RM20,000 payment this part of her evidence also contradicts PW2's claim that he did tell her what the RM20,000 was for. The following is what PW2 said with confidence at p 83 of the notes of proceeding:

Q: When you asked Marcia Loh to issue a cheque for the sum of RM20,000.00 payable to Joannes Lau did you tell her that the payment was in respect of a deposit relating to the purchase of land belonging to Joannes Lau?

A: Yes.

[30] In fact PW2 not only contradicted Marcia Loh but also contradicted himself as can be seen from his answers to questions 13 and 14 of his witness statement (PWS2). This is what he said:

13. Q Was Marcia Loh there when the payment of RM20,000.00 was paid vide the said payment voucher?

A: Yes, because I talked to her.

14. Q Did you tell her that it was for the purchase of land which you intend to buy for her?

A: No, because I would tell her later.

[31] It is obvious that PW2 was less than candid in his evidence on this crucial point. I have my reservations on his creditworthiness as a witness. In a situation such as this the rule to follow is that which Thompson LP laid down in *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105; [1961] 1 LNS 41, as follows:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence 'must in law be rejected' is to go too far and is wrong.

[32] Reverting back to the question of whether Marcia Loh had entered into a contract with Joannes Lau for the purchase of the land the following exchanges in cross-examination between learned counsel for Joannes Lau and Marcia Loh is proof that there was in law no such agreement:

Q: You heard nothing about the description of the land, who was the purchaser, the price, the date of the transfer which were written on the purported payment voucher, right?

A: I did not hear.

Q: Refer to paragraph 2. Am I right to say that as a matter of fact there was no agreement made on 22.5.2000 between the land owner and yourself?

A: Yes.

Q: At the time when the sum of RM20,000.00 was paid on 22.5.2000, did you know that you were the nominee purchaser?

A: I did not know.

Q: In that case did your father tell you that you would be the nominee purchaser?

A: My father only told me that I would be the nominee purchaser at Bong Ah Loi's office.

Q: Before your father told you that you were the nominee purchaser did you have any intention to buy this land?

A No.

[33] The last answer above is evidence that there was no consensus ad idem between Marcia Loh and Joannes Lau at the time the payment voucher was issued, bearing in mind she is claiming in her capacity as purchaser of the land and asserting that the payment voucher forms part of the deal. The question is whether the payment voucher created a valid enforceable contract between Marcia Loh and Joannes Lau. In para 2 of her statement of claim this is what she pleaded:

> 2. By an agreement made on the 22nd May, 2000 between the Plaintiff and the Defendant, the Defendant agreed to sell and the Plaintiff agreed to purchase the said Land at the price of RM200,000.00.

[34] The reference to 'an agreement' is a reference to the payment voucher. In *Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd* [1992] 3 CLJ 611 (Rep); [1992] 1 CLJ 204, VC George J said at p 206:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be consensus ad idem; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

[35] In the instant case the alleged 'agreement', ie the payment voucher does not mention who the parties to the contract were and there is no evidence that Marcia Loh and Joannes Lau intended to create legal relations over the land. As nominee purchaser Marcia Loh has no contractual relationship with Joannes Lau. Her contractual relationship if at all is with PW2. Marcia Loh did not even know who purchased the land and had no intention of buying the land.

Her role was merely to issue a cheque in the sum of RM20,000 for purposes which she herself did not even know of.

[36] Therefore her pleading in para 8 of her reply that the price of RM200,000 was 'expressly agreed on a willing seller and willing buyer basis' is refuted by her own evidence. Neither was PW2 the buyer because he did not even tell Marcia Loh he was buying the land. Even if he was the buyer he is not the plaintiff in this case and is therefore not entitled to the reliefs sought by Marcia Loh. There is no evidence that PW2 had met or discussed with Joannes Lau to buy his land. One would expect this to be the least that contracting parties would do if they intended to create legal relations.

[37] Mr Anthony Tai for Marcia Loh conceded that there was never an oral agreement between Marcia Loh and Joannes Lau for the sale and purchase of Joannes Lau's land as the oral agreement was between PW2 and Joannes Lau. If that is the case then Marcia Loh's claim must fall flat to the ground as she is suing Joannes Lau in her capacity as purchaser of the land. If she was not even a party to the agreement she cannot claim to have any locus standi to maintain this action. In *CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176 the plaintiff's claim was dismissed on the ground that there was no privity of contract between the plaintiff and the defendant and consequently the plaintiff had no legal right to sue on the alleged oral contract.

[38] Further Marcia Loh's testimony goes against the grain of her pleading in para 3.1 of her statement of claim that there was an 'oral conversation' between her and PW1 with Joannes Lau for the purchase of the land. It is trite principle that parties are bound by their pleadings. In *Ahmad bin Daud v Koperasi Jimat Cermat dan Pinjaman Mercantile Bhd* [2011] 4 MLJ 516; [2010] 5 AMR 540 the plaintiff's claim was dismissed as his claim was based on a document that was different from the pleaded document. Marcia Loh's case is worse. While her pleaded case is that it was she who entered into an agreement with Joannes Lau the evidence of her father (PW2) shows otherwise. Marcia Loh's confusion as to the parties who actually entered into the agreement with Joannes Lau is a clear indication that her claim is a sham.

[39] In *Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535 the agreement was recognised as valid and enforceable because, as Shaikh Daud JCA said at p 538:

> The parties have been identified, the property, the price and the terms too have been identified with sufficient certainty. Such an agreement is enforceable as if it was embodied in a sale and purchase agreement. Our finding is fortified by the decision in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327.

[40] In *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, the case cited by Shaikh Daud JCA above, Gopal Sri Ram JCA (as he then was) said this at p 336:

> They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity.

[41] Having regard to the facts and the applicable principles the answer to the second issue must be in the negative, ie there is no oral agreement for the sale of the land and the payment voucher did not create any valid contract between Marcia Loh and Joannes Lau and this is so even assuming the payment voucher is not a forgery. It is clear that the issuance of the payment voucher was for the purpose as claimed by Joannes Lau, namely for partial payment of the earth he supplied to Trident's land and not for the sale of his land as claimed by PW2.

CONCLUSION

[42] For reasons stated above Marcia Loh's claim for specific performance is dismissed and Joannes Lau's counterclaim in the first suit and his claim in the second suit are allowed in terms. Costs of these two actions shall be borne by Marcia Loh for the first suit and the defendants in the second suit, to be taxed unless otherwise agreed.

Plaintiff's claim dismissed with costs and defendant's counterclaim allowed with costs.

Reported by Ashgar Ali Ali Mohamed